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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

GEORGE SIEG,

Plaintiff and Appellant,

v.

DENNIS TORCHIA et al.,

Defendants and Respondents.

A152750

(Sonoma County
Super. Ct. No. SCV-258043)

George Sieg, a flooring contractor, appeals the dismissal of his breach of contract suit against Dennis Torchia and his wife pending decision in a concurrent administrative proceeding before the Contractors State License Board (CSLB) on a disciplinary complaint by the Torchias. Because the trial court had discretion to dismiss under the doctrine of primary jurisdiction, and because Sieg fails to demonstrate that the dismissal of this action on that basis was an abuse of discretion, we will affirm.

I. BACKGROUND

Sieg, who operates through his firm, B&G Hardwood Flooring (B&G), is a licensed contractor specializing in hardwood flooring. In January of 2012, he gave Dennis Torchia an estimated price for a flooring installation in the Torchias' home. Torchia did not sign the contract until June, when the wood was delivered for installation.

Before the installation began, Sieg worried that the moisture in the ground might cause damage to the new wood floor. He requested that Torchia install a plastic sheet

beneath the wood to protect it from moisture. When Torchia did not install the plastic, Sieg refused to begin work until Torchia signed a contract agreeing to indemnify him against, and release him from, claims relating to the installation. Though Torchia signed the contract, he claims he felt pressure to sign it and did not fully understand the ramifications of his actions. B&G began work installing the floor at the end of June, only after the indemnity contract was signed.

Four weeks after B&G completed the installation, the floor began showing noticeable signs of damage. Torchia then filed a complaint against Sieg with the CSLB. After investigation, CSLB filed a disciplinary charge against Sieg in October of 2015.

While the CSLB proceeding was pending, Sieg filed this case in November of 2015. Sieg claimed that Torchia breached the contract indemnifying D&B from liability by filing a complaint with the CSLB. He sought restitution for loss of income to B&G caused by the CSLB disciplinary charge and reimbursement for his attorneys' fees in the CSLB proceedings.

A bench trial commenced in this case in April 2017, while the CSLB proceedings were still pending. The trial court heard testimony from various witnesses, but decided to delay the setting of final argument in the case until after the CSLB issued a decision in the CSLB proceedings.

In June 2017, the administrative law judge (ALJ) in the CSLB proceedings issued a Proposed Decision finding that Sieg's installation of the boards too close to the walls and incorrect fastener placement caused the damage to the floor, rather than moisture as Sieg claimed. The ALJ further found that the indemnity and release Torchia signed was unenforceable because it did not contain provisions required under Business and Professions Code section 7159, it was signed under duress, and it was an unconscionable contract of adhesion.

The CSLB adopted the ALJ's ruling as its Decision and Order and awarded restitution to the Torchias. Sieg then filed with the CSLB a petition for reconsideration of the decision. After the CSLB issued its Decision and Order (but apparently before the CSLB ruled on Sieg's petition for reconsideration), the trial court held closing arguments

in this case. On the record during closing argument, the court explained its tentative view of how to proceed as follows:

“[F]or Mr. Sieg to prevail in this court, he would have to have a ruling by the administrative law judge that he was correct and that the complaint should be dismissed. [¶] I think the administrative law judge based some of his decision or his decision as a whole on specific factual findings that were out of the release . . . [If the release were enforceable] perhaps . . . Mr. Torchia might be prohibited from complaining based on the moisture but not on the other aspects of the job. *And we now have a decision which is in part at least based on other aspects of the job.* So I don’t think that Mr. Sieg has met his burden in terms of proceeding on his action in this Court.

“Now, if he is successful upon reconsideration or successful in overturning the decision by writ, it may be a different situation, but that’s not where we are at this time. And I’m a little bit in a quandary as to whether I should just dismiss this action with prejudice, dismiss it without prejudice, or whether I should stay it pending a final determination by the administrative law judge after all appeals are exhausted

“I’m inclined to dismiss it at this point, and I’ll take brief argument as to whether it should be with or without prejudice or whether you think I’m off base, and I’ll give you a chance to put that on the record, but that’s where I am.” (Italics added.)

After taking the case under submission, the court entered an order in accord with these tentative comments, dismissing without prejudice. From the ensuing judgment, Sieg appealed. Sieg also sought review of the CSLB decision by petition for a writ of administrative mandamus in superior court,¹ and a separate appeal from the denial of that petition is now pending before this Division. (*Sieg et al. v. California Contractors State License Board* (A156089, app. pending).) We now turn to the merits of the present appeal.

¹ We grant the Torchias’ request that we take judicial notice of the order denying this writ. Since we do not address in this appeal the merits of the ruling issued in that writ proceeding, we deny Sieg’s request that we take judicial notice of other documents filed in the writ proceeding.

II. DISCUSSION

The doctrine of primary jurisdiction applies where an action is originally cognizable in the courts, but a decision in the action will or may turn on the resolution of issues that are within the concurrent jurisdiction of an administrative tribunal. (See *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 381 (*Farmers Exchange*).) Whether to invoke the doctrine is a matter of judicial discretion. “[I]n the absence of legislation clearly addressing whether a court may exercise discretion under the primary jurisdiction doctrine, a court may exercise such discretion and may decline to hear a suit until the administrative process has been . . . completed.” (*Id.* at p. 381.) We review a dismissal under the primary jurisdiction doctrine for abuse of discretion.²

We see no such abuse here. By this action, Sieg seeks to mount a counterattack against the Torchias’ disciplinary complaint against him. He argues that dismissal of his action was erroneous because the enforceability of the indemnity and release is a matter of law; the CSLB has no special expertise on that issue warranting deference to its decisionmaking, he contends. But what he fails to appreciate is that the trial court did not simply defer to the CSLB on the issue of enforceability. It recognized that there were issues in play before the CSLB that went beyond the scope of the indemnity and release, and thus that wholly apart from issues arguably covered by that contract, the Torchias had grounds to complain. Essentially, as we see it, the court decided it should “wait and see” what was left to adjudicate after review of the CSLB’s decision is exhausted.

² In a supplemental authority letter prior to oral argument, the Torchias cited *County of Sonoma v. Gustely* (2019) 36 Cal.App.5th 704 as support for the trial court’s ruling here, but that case arose in a different procedural context. In *Gustely*, the administrative decision had already become final, so the issue presented was not whether the court should defer ruling while the administrative process ran its course. (*Id.* at pp. 710, 713–714.) Instead, the appellate court in *Gustely* considered the scope of the trial court’s discretion to alter the administrative decision in a subsequent default judgment proceeding when the county plaintiff brought suit to enforce the earlier administrative ruling. (*Id.* at pp. 713–714.)

To accomplish that, the trial court discussed with counsel whether the best course was to stay or to dismiss the action without prejudice. (See *Farmers Exchange*, *supra*, 2 Cal.4th at p. 401 [directing a stay of proceedings].) Sieg’s counsel did not ask for a stay; indeed, he expressly requested that the court not stay the case. And on appeal, Sieg still does not argue the court should have stayed the action. In these circumstances, any contention that the court should have stayed the case instead of dismissing it has been forfeited. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10 [appellate issues must be raised in opening brief]; *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316 [appellant may not pursue new theory on appeal].)

If Sieg eventually does manage to succeed in obtaining reversal of the CSLB’s decision, he will be able to avail himself of the option to re-file this action, and at that point resume his attempt to establish that the Torchias were not only wrong to file the CSLB disciplinary complaint, but in breach of contract for doing so. In the meantime, the trial court correctly recognized that the predicate for Sieg’s breach of contract counterattack against the Torchias—which requires that he establish the disciplinary proceedings were wholly without basis, including those aspects of it that fall outside the indemnity and release—is missing. While staying the proceeding may well have been a more efficient option, the court was within its discretion to conclude that dismissal without prejudice made sense as well.

III. DISPOSITION

The trial court’s dismissal is affirmed.

STREETER, J.

We concur:

POLLAK, P.J.

TUCHER, J.